In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Brief in Opposition to the Motion to Dismiss or Affirm of the Appellee and Opposition to the Motion for Leave to File an Amicus Curiae Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts

FRANCIS X. BELLOTTI,
Attorney General,
THOMAS R. KILEY,
ALAN K. POSNER,
S. STEPHEN ROSENFELD,
Assistant Attorneys General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2205
Attorneys for Appellants.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

PROCEDURAL RULES.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Brief in Opposition to the Motion to Dismiss or Affirm of the Appellee and Opposition to the Motion for Leave to File an Amicus Curiae Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts

Preliminary Statement

Two documents have been filed with this Court suggesting that the appeal from the judgment of the United States District Court for the District of Massachusetts was improperly docketed and should be dismissed. Both documents assert that the Attorney General of the Commonwealth of Massachusetts,

who was the attorney of record for all defendants in the district court and whose relationship with the defendants is governed by state law,[1] could not prosecute an appeal without the consent of the state officers who are the nominal appellants.[2] The first such document is a motion to dismiss or affirm filed by the attorneys for Helen B. Feeney, which contains argument not only on the authority of the Attorney General, but also on the merits of the appeal. The second document contains no argument on the merits of the appeal. It contains both a motion for leave to file an amicus curiae brief prior to consideration of the jurisdictional statement and the brief itself. The Attorney General of the Commonwealth, as he is counsel to the appellants in this matter, did not assent to the motion to file an amicus curiae brief and, pursuant to Supreme Court Rules 16(4) and 42(3), hereby opposes both the motion to dismiss and the motion for leave to file an amicus curiae brief. Because the reasons for opposition are substantially the same, appellants submit one brief opposing both motions.

[1] The obligation of the Attorney General to defend the Commonwealth and its officers is both a common law and statutory obligation. *Secretary of Administration and Finance* v. *Attorney General*, 1975 Mass. Adv. Sh. 665, 326 N.E. 2d 334 (1975); *cf. Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). The pertinent statute, Mass. Gen. Laws c. 12, § 3, is set forth as Appendix A to this brief.

[2] The issue of the authority of the Attorney General acting on behalf of the named defendants to take an appeal to fully defend an allegedly unconstitutional state statute was raised in the court below as part of plaintiffs' opposition to the state defendants' motions for post judgment relief. In addition to the stipulation reproduced as an appendix in both the motion to dismiss and motion for leave to file an amicus brief, the district court had before it the affidavit of Attorney General Francis X. Bellotti which is reproduced and set forth as Appendix B to this brief. The issue was briefed by the appellee and rebutted orally by appellants. The district court made no written findings on the question.

Argument

Contrary to the position taken by the appellee, the Attorney General has properly appealed on behalf of the named defendants. He has taken this appeal in order to defend the constitutionality of a state statute. The state law of Massachusetts plainly supports his action, and no principle of federal law stands in opposition.

The named defendants in this case are the Personnel Director and the members of the Civil Service Commission of Massachusetts. They were sued under the well-established principles of *Ex parte Young*, 209 U.S. 123 (1908). Because the named defendants are the state officers directed by the Massachusetts Legislature to implement the provisions of the challenged statute, Mass. Gen. Laws c. 31, § 23, they are the only officials capable of effectuating the injunctive relief sought. They were therefore the only appropriate parties defendant in the district court. *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 603 (1957).

The relevant state law makes plain that named defendants have no role in this litigation other than that prescribed by *Ex parte Young*. They possess no discretion either in deciding whether or not the challenged statute will be enforced, in selecting counsel to represent them in litigation, or in determining the strategy that will be followed during litigation. The necessity under *Ex parte Young* that individual, named officials be sued in order to attack the constitutionality of a statute is entirely separate from the question of what course counsel will follow in defending the statute during the course of the proceedings. Such decisions are reserved to the Attorney General, and the personal wishes of appointive officials, although important, cannot carry any formal weight.

Because the relationship between the nominal defendants and the Attorney General is fixed by state law, the arguments of the appellee premised on the normal, private attorney-client relationship have no place here.[3] Massachusetts law leaves no question on this point. The Attorney General alone is authorized by statute to appear for the Commonwealth, its officers and agencies in actions commenced in state courts. Mass. Gen. Laws c. 12, § 3. The views of the ministerial officers who are named as defendants, while often followed and always considered,[4] are not controlling on the decision of the Attorney General who is charged with the formulation and implementation of a consistent statewide legal policy. Thus, the Supreme Judicial Court of the Commonwealth has held that the Attorney General may properly refuse to prosecute an appeal even when the involved agency or officer desires that an appeal be taken. *Secretary of Administration and Finance*

[3] Such cases as *Cord* v. *Smith*, 338 F. 2d 516 (9th Cir. 1964), and *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & Elec. Co.*, 245 F. 2d 630 (8th Cir. 1957), dealing exclusively with the private attorney-client relationship, are of dubious precedental value on the issue presented by the motion to dismiss.

[4] The appellee and amicus would suggest that in this case the Attorney General has refused to consider the recommendations of the nominal defendants and has abused his discretion by failing to appoint a Special Assistant Attorney General. However, the affidavit reproduced as Appendix B indicates that there was full consideration of those views and constant communication between the Department of the Attorney General and agents for the Personnel Director and Civil Service Commission. Furthermore, appointment of a Special Assistant Attorney General, when the Attorney General was vigorously defending the statute, would have been inimical to the duty to implement a consistent legal policy for the Commonwealth. *Secretary of Administration and Finance* v. *Attorney General*, 1975 Mass. Adv. Sh. 665, 326 N.E. 2d 334 at n. 8. *See, also, Nugent ex rel. Collins* v. *Vallone*, 91 R.I. 145, 161 A. 2d 802 (1960); *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, 459 F. 2d 1082 (9th Cir. 1972).

v. *Attorney General*, 1975 Mass. Adv. Sh. 665, 326 N.E. 2d 334 (1975). While it is true that this case deals with the converse of that situation, the language of the opinion leaves no doubt about the proper interpretation of state law and its application to the facts of the case at bar:

> Although we agree that the canons permit the client to make such decisions where the traditional attorney-client relationship exists, a careful reading of G.L. c. 12, § 3, its legislative history and the history of the office of Attorney General compel us to conclude that something other than that traditional attorney-client relationship exists where the Attorney General "appears for" an officer, department head or secretary pursuant to c. 12. We hold that the Attorney General, as "chief law officer of the Commonwealth," *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 389, 131 N.E. 207, 212 (1921), has control over the conduct of litigation involving the Commonwealth, and this includes the power to make a policy determination not to prosecute the Secretary's appeal in this case. . . .
>
> *The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance.* G.L. c. 12, § 3. He also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility. . . . 326 N.E. 2d 334 at 336, 338. (Emphasis added.)

It is of central importance that, in the words of the Supreme Judicial Court, "[t]he Attorney General represents the Commonwealth," whether or not the Commonwealth is actually named as a party in the litigation. The appellee suggests, in direct contradiction to the Supreme Judicial Court, that the Attorney General represents the Commonwealth *only* if the Commonwealth is a named defendant; otherwise, argues the appellee, the Attorney General is subordinated to the wishes of the official actually named as the defendant, whoever that may be. Specifically, the appellee has implied that if the district court had not dismissed the Commonwealth as a named defendant,[5] then the Attorney General's appeal would be proper. However, the Attorney General's representation of the Commonwealth and its interests as contemplated by state law cannot be made to turn on whether the Commonwealth is named by the plaintiffs as a defendant. Such a result would subordinate the authority of the Attorney General under state law to the vagaries of the plaintiffs' pleadings. This court should reject an argument which would make the state's ability to defend its statutes turn on either the form of the pleadings or the personal desires of appointive executive officials who have no constitutional or statutory role in the law-making process.

The authority of the Attorney General to appeal on behalf of the officers of the Commonwealth in federal court extends, under the provisions of Mass. Gen. Laws c. 12, § 3, to all matters "when requested by the governor *or* by the general court or either branch thereof" (emphasis added). In this

[5] The Commonwealth and Division of Civil Service were dismissed as parties to this case because they are not "persons" within the meaning of 42 U.S.C. § 1983. The appellee suggests that, in choosing to assert a proper defense under § 1983, the Attorney General sacrificed control of the course of the litigation. This is a dangerous proposition, and appellants have found no federal court decision which supports it.

particular instance, formal resolutions adopted by both branches of the Legislature were overwhelmingly passed on April 6, 1976.[6] Any doubt that the Attorney General is the proper officer to represent the named defendants and decide to appeal the adverse decision of the district court is removed by the existence of those formal resolutions. Thus, if the question presented is resolved with reference to state law, this case has been properly docketed and the motion to dismiss and motion for leave to file an amicus brief should be denied.

Counsel for the appellee and amicus suggest, however, that it is inappropriate to look to the law of Massachusetts and that, under the rules of this Court as well as the provisions of 28 U.S.C. § 1253, only the named parties can authorize an appeal to this Court. Even the cases they cite, however, involve consideration and contain discussion of state law. In *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397 (1917), this Court refused to allow the Attorney General of Louisiana to appeal in a case involving the sale of land by the Tensas Basin Levee District Board of Commissioners, a creature of the Louisiana Legislature with power to sue and be sued. The State Supreme Court held that as a matter of state law neither Louisiana nor the Attorney General were proper parties to challenge that sale, and this Court noted, "This decision determining the effect of the state statutes . . . is accepted as conclusive by this court . . . unless it has been modified by statute [or] . . . modifying decision." *Id.* at 402.

Similarly, the authority of an Attorney General to appear in federal courts on behalf of state officials has been decided in part by reference to state law in cases such as *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (power of Minnesota Attorney General to intervene on behalf of the State Senate in an apportionment case); *State ex rel. Shevin* v.

[6] The resolution of the House of Representatives appears as Appendix C to this brief and that of the Senate as Appendix D.

Exxon Corp., 526 F. 2d 266 (5th Cir. 1976) (power of the Florida Attorney General to institute suits under federal law in the name of governmental entities without specific authorization); *Wade* v. *Mississippi Cooperative Extension Service*, 392 F. Supp. 229 (N.D. Miss. 1975) (power of the Mississippi Attorney General to represent a state agency despite the agency's desire to proceed with counsel of their own choosing).

Application of the principles of federalism compel the conclusion that the Attorney General, acting pursuant to state law, is the proper state official to decide whether or not to pursue the instant appeal. The individual defendants are named in this case in part on the basis of the salutary "fiction" which lies at the heart of *Ex parte Young*, 209 U.S. 123 (1908). Although the Eleventh Amendment and doctrine of sovereign immunity might have theoretically prohibited cases like this at one time, it is now clear that such a suit may be brought against a state officer, even though both the purpose and effect of the action are to attack the constitutionality of a legislative policy.

In this case the *Ex parte Young* principle permits plaintiffs to attack the veterans' preference statute on its face, without a direct confrontation between the federal court and the State Legislature. Plaintiffs would have the *Ex parte Young* technique for avoiding such confrontation become a vehicle for shutting this Court's door to the defense of a state statute the Legislature obviously supports strongly.[7]

[7] The resolutions appended hereto as Appendices C and D respectively are not the only evidence of the importance the Legislature has attached to veterans' preference. Since the first veterans' preference statute took effect in Massachusetts in 1887, some form of preference has continuously existed. Indeed, even after the district court enjoined the implementation of Mass. Gen. Laws c. 31, § 23, in this case, the Legislature passed an interim statute designed to operate during the pendency of this appeal. Mass. St. 1976, c. 200 (Jurisdictional Statement, App. C).

Plaintiffs' position, if adopted, would insure existence of the very "needless friction with state policies"[8] that this Court has sought to put aside.

In this case, the roles of the named defendants in implementing the legislative policy of preference for veterans are ministerial in nature. They are directed by statute to utilize this preference in the hiring process and are without authority to administratively reverse, modify, or disregard the law. Similarly, neither the Governor nor the Secretary of Administration and Finance could circumvent the normal lawmaking processes and effectively repeal the statute because they happen to disagree with it. *Ex parte Young* provides a vehicle for opening the judicial process to persons who otherwise could not obtain redress for perceived constitutional wrongs. That vehicle should not now be perverted to deny the Commonwealth, through the Attorney General, an opportunity to defend itself when its statutes are assailed.

Conclusion

In this case, the Attorney General, by law, represents the named defendants. The jurisdictional statement is filed in their names by their attorney. Thus, this appeal has been docketed in conformity with the rules of this Court and 28

[8] *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 500 (1941).

U.S.C. § 1253. For all these reasons, it is submitted that this Court should deny both the motion to dismiss filed by the counsel to the appellee and the motion for leave to file an amicus curiae brief.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
THOMAS R. KILEY,
ALAN K. POSNER,
S. STEPHEN ROSENFELD,
Assistant Attorneys General,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2205

Attorneys for Appellants.

Appendix A

GENERAL LAWS, CHAPTER 12.

§ 3. **[Appearances for commonwealth, prosecution or defense; rendering of legal services]**

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

Appendix B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,
PLAINTIFF,

v.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 75-1991-T

Affidavit

I, Francis X. Bellotti, on oath depose and say that I am the duly elected Attorney General of the Commonwealth and as such, I am the chief law officer of the Commonwealth. I have read the Stipulation submitted to this Court on June 22, 1976 and consider it to be inaccurate in the sense that it omits the following relevant facts:

1. On or about April 13, 1976, I met with the Personnel Administrator and the Chairperson of the Civil Service Commission to discuss their views concerning an appeal to this Court's decision. While it is true that I personally had no further discussion with the nominal defendants concerning issues related to appeal prior to filing the Notice of Appeal with this Court, it is inaccurate to suggest that there was no communication between offices.

2. On information and belief, I state that there was frequent, perhaps daily, oral communication between John

Burrill, Counsel for the Personnel Administrator and the Civil Service Commission, and attorneys from the Department of the Attorney General. Furthermore, I caused letters to be sent to Mr. Burrill concerning the application for a stay on May 19, 1976 and June 2, 1976. Also on information and belief, I state that there was oral communication concerning the subject motions between Catherine White and Daniel Taylor of the Governor's legal staff and attorneys for the Department of the Attorney General.

3. Normal communication between by office and state agencies is through counsel. It would have been a radical departure from the norm had there been repeated personal contact between the named defendants in this case and me.

4. I fully considered the views of the Governor and the nominal defendants in this case before making any decision to appeal the judgment of this Court to the Supreme Court of the United States and have weighed their interests prior to filing the subject motions. In the final analysis, after an exhaustive deliberative process, I am persuaded that my primary responsibility is to duly enacted legislation and, particularly in light of the April 6, 1976 resolution of the Senate and House of Representatives, I have filed a notice of appeal.

5. The desire of the Governor for special counsel was first made known to me on June 22, 1976. The request of the Civil Service Chairman was made on May 27, 1976 and has never been refused. I remain available to discuss these matters and all other legal business of the Commonwealth with the Governor, Personnel Administrator, and Civil Service Commission.

FRANCIS X. BELLOTTI
Attorney General

Then personally appeared the above-named Francis X. Bellotti before me and made oath that the above statements are true to the best of his knowledge and belief.

DIANNE L. CUNIO
Notary Public

My commission expires: June 20, 1980

Appendix C

THE COMMONWEALTH OF MASSACHUSETTS

In The Year One Thousand Nine Hundred and Seventy-Six

RESOLUTIONS REQUESTING THE ATTORNEY GENERAL OF THE COMMONWEALTH TO APPEAL THE FEDERAL COURT DECISION DECLARING CERTAIN VETERANS PREFERENCE LAWS OF THE COMMONWEALTH UNCONSTITUTIONAL.

Whereas, The United States District Court, sitting as a three judge court, in a two to one decision, rendered in the case entitled *Helen B. Feeney v. Commonwealth of Massachusetts, et al.*, Civil Action No. 75-1991-T, which declared the Massachusetts General Laws, chapter thirty-one, section twenty-three, unconstitutional, and enjoined the Massachusetts Civil Service Director and the members of the Massachusetts Civil Service Commission from utilizing said law in any future selection of persons to fill civil service positions with the commonwealth; and

Whereas, The rights of eight hundred thousand veterans within the Commonwealth, particularly those veterans who served in the Vietnam conflict, are adversely affected by said decision which can only be appealed by the Attorney General of the Commonwealth, thereby giving these citizens their day in court; now therefore, be it

Resolved, That the Massachusetts House of Representatives hereby respectfully urges the Attorney General of the Commonwealth to appeal the decision rendered by said federal

court in said case of *Feeney v. Commonwealth, et al.*, with all due deliberate speed and to its final judgment by the Supreme Court of the United States; and be it further

Resolved, That copies of these resolutions be transmitted forthwith by the Clerk of the House of Representatives to the Attorney General of the Commonwealth.

House of Representatives, adopted, April 6, 1976.

THOMAS W. McGEE
SPEAKER OF THE HOUSE

WALLACE C. MILLS
CLERK OF THE HOUSE

WILLIAM F. HOGAN
Offered by: REPRESENTATIVE WILLIAM F. HOGAN

Appendix D

THE COMMONWEALTH OF MASSACHUSETTS

In The Year One Thousand Nine Hundred And Seventy-Six

RESOLUTIONS REQUESTING THE ATTORNEY GENERAL OF THE COMMONWEALTH TO APPEAL THE FEDERAL COURT DECISION DECLARING CERTAIN VETERANS PREFERENCE LAWS OF THE COMMONWEALTH UNCONSTITUTIONAL.

Whereas, The United States District Court, sitting as a three judge court, in a two to one decision, rendered a decision in the case entitled *Helen B. Feeney v. Commonwealth of Massachusetts, et al.*, Civil Action No. 75-1991-T, which declared the Massachusetts General Laws, chapter thirty-one, section twenty-three, unconstitutional, and enjoined the Massachusetts Civil Service Director and the members of the Massachusetts Civil Service Commission from utilizing said law in any future selection of persons to fill civil service positions with the commonwealth; and

Whereas, Said decision, as stated in the dissent thereto, was a flagrant abuse of the doctrine of the separation of powers in that two federal judges have interposed the federal court in between the will of the people of the commonwealth and the expression of that will by the making of laws by its elected representatives; and

Whereas, The rights of eight hundred thousand veterans within the commonwealth, particularly those veterans who served in the Vietnam conflict, are adversely affected by said

decision which can only be appealed by the Attorney General of the Commonwealth, thereby giving these citizens their day in court; now therefore, be it

Resolved, That the Massachusetts Senate hereby respectfully urges the Attorney General of the Commonwealth to appeal the decision rendered by said federal court in said case of *Feeney v. Commonwealth, et al*, with all due vigor and to its final judgment by the Supreme Court of the United States; and be it further

Resolved, That copies of these resolutions be transmitted forthwith by the Clerk of the Senate to the Attorney General of the Commonwealth.

Senate, adopted, April 6, 1976.

KEVIN B. HARRINGTON
PRESIDENT OF THE SENATE

EDWARD B. O'NEILL
CLERK OF THE SENATE

ARTHUR H. TOBIN

Offered by: SENATOR ARTHUR H. TOBIN